



## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Parts 61 and 63

[EPA-R06-OAR-2020-0086; FRL-8847-01-R6]

### National Emission Standards for Hazardous Air Pollutants; Delegation of Authority to Oklahoma

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Oklahoma Department of Environmental Quality (ODEQ) has submitted updated regulations for receiving delegation and approval of its program for the implementation and enforcement of certain National Emission Standards for Hazardous Air Pollutants (NESHAP), as provided for under previously approved delegation mechanisms. The updated state regulations incorporate by reference certain NESHAP promulgated by the Environmental Protection Agency (EPA) as they existed through June 30, 2019. The EPA is proposing to approve ODEQ's requested delegation update. The proposed delegation of authority under this action applies to sources located in certain areas of Indian country as discussed herein.

**DATES:** Written comments on this proposed rule must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R06-OAR-2020-0086, at <http://www.regulations.gov> or via email to [barrett.richard@epa.gov](mailto:barrett.richard@epa.gov). Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make.

The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e., on the web, cloud, or other file sharing system). For additional submission methods, please contact Rick Barrett, 214-665-7227, [barrett.richard@epa.gov](mailto:barrett.richard@epa.gov). For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

*Docket:* The index to the docket for this action is available electronically at [www.regulations.gov](http://www.regulations.gov). While all documents in the docket are listed in the index, some information may not be publicly available due to docket file size restrictions or content (e.g., CBI).

**FOR FURTHER INFORMATION CONTACT:** Rick Barrett, EPA Region 6 Office, ARPE, (214) 665-7227, [barrett.richard@epa.gov](mailto:barrett.richard@epa.gov). Out of an abundance of caution for members of the public and our staff, the EPA Region 6 office will be closed to the public to reduce the risk of transmitting COVID-19. We encourage the public to submit comments via <https://www.regulations.gov>, as there will be a delay in processing mail and no courier or hand deliveries will be accepted. Please call or e-mail the contact listed above if you need alternative access to material indexed but not provided in the docket.

**SUPPLEMENTARY INFORMATION:** Throughout this document wherever “we,” “us,” or “our” is used, we mean the EPA.

## **Table of Contents**

- I. What Does This Action Do?
- II. What is the Authority for Delegation?
- III. What Criteria Must Oklahoma’s Program Meet to be Approved?
- IV. How did ODEQ Meet the NESHAP Program Approval Criteria?
- V. What is Being Delegated?
- VI. What is Not Being Delegated?

VII. How Will Statutory and Regulatory Interpretations be Made?

VIII. What Authority Does the EPA Have?

IX. What Information Must ODEQ Provide to the EPA?

X. What is the EPA's Oversight Role?

XI. Should Sources Submit Notices to the EPA or ODEQ?

XII. How Will Unchanged Authorities be Delegated to ODEQ in the Future?

XIII. Impact on Areas of Indian Country

XIV. Proposed Action

XV. Statutory and Executive Order Reviews

### **I. What Does This Action Do?**

The EPA is proposing to approve the delegation of the implementation and enforcement of certain NESHAPs to ODEQ. If finalized, the delegation will provide ODEQ with the primary responsibility to implement and enforce the delegated standards.

### **II. What is the Authority for Delegation?**

Section 112(l) of the Clean Air Act (CAA), and 40 CFR part 63, subpart E, authorize the EPA to delegate authority to any State or local agency which submits adequate regulatory procedures for implementation and enforcement of emission standards for hazardous air pollutants. The hazardous air pollutant standards are codified at 40 CFR parts 61 and 63.

### **III. What Criteria Must Oklahoma's Program Meet to be Approved?**

Section 112(l)(5) of the CAA requires the EPA to disapprove any program submitted by a State for the delegation of NESHAP standards if the EPA determines that:

(A) the authorities contained in the program are not adequate to assure compliance by the sources within the State with respect to each applicable standard, regulation, or requirement established under section 112;

(B) adequate authority does not exist, or adequate resources are not available, to implement the program;

(C) the schedule for implementing the program and assuring compliance by affected sources is not sufficiently expeditious; or

(D) the program is otherwise not in compliance with the guidance issued by the EPA under section 112(l)(2) or is not likely to satisfy, in whole or in part, the objectives of the CAA.

In carrying out its responsibilities under section 112(l), the EPA promulgated regulations at 40 CFR part 63, subpart E setting forth criteria for the approval of submitted programs. For example, in order to obtain approval of a program to implement and enforce Federal section 112 rules as promulgated without changes (straight delegation) for part 70 sources, a state must demonstrate that it meets the criteria of 40 CFR 63.91(d). 40 CFR 63.91(d)(3) provides that interim or final Title V program approval will satisfy the criteria of 40 CFR 63.91(d).<sup>1</sup> The NESHAP delegation for Oklahoma, as it applies to both part 70 and non-part 70 sources, was most recently approved on October 22, 2018 (83 FR 53183).

#### **IV. How did ODEQ Meet the NESHAP Program Approval Criteria?**

As to the NESHAP standards in 40 CFR parts 61 and 63, as part of its Title V submission ODEQ stated that it intended to use the mechanism of incorporation by reference to adopt unchanged Federal section 112 standards into its regulations. This commitment applied to both existing and future standards as they applied to part 70 sources. The EPA's final interim approval of Oklahoma's Title V operating permits program delegated the authority to implement certain NESHAP, effective March 6, 1996 (61 FR 4220, February 5, 1996). On December 5, 2001, the EPA granted final full approval of the State's operating permits program (66 FR 63170). These interim and final Title V program approvals satisfy the upfront approval criteria of 40 CFR 63.91(d). Under 40 CFR 63.91(d)(2), once a state has satisfied up-front approval criteria, it needs only to reference the previous demonstration and reaffirm that it still meets the criteria for any

---

<sup>1</sup> Some NESHAP standards do not require a source to obtain a Title V permit (e.g., certain area sources that are exempt from the requirement to obtain a Title V permit). For these non-Title V sources, the EPA believes that the State must assure the EPA that it can implement and enforce the NESHAP for such sources. *See* 65 FR 55810, 55813 (September 14, 2000). The EPA previously approved Oklahoma's program to implement and enforce the NESHAP as they apply to non-part 70 sources. *See* 66 FR 1584 (January 9, 2001).

subsequent submittals of the section 112 standards. ODEQ has affirmed that it still meets the up-front approval criteria. With respect to non-part 70 sources, the EPA has previously approved delegation of NESHAP authorities to ODEQ after finding adequate authorities to implement and enforce the NESHAP for such sources. *See* 66 FR 1584 (January 9, 2001).

## **V. What is Being Delegated?**

By letter dated December 23, 2019, ODEQ requested the EPA to update its existing NESHAP delegation. With certain exceptions noted in section VI of this document, Oklahoma's request included NESHAPs in 40 CFR parts 61 and 63. ODEQ's request included newly incorporated NESHAPs promulgated by the EPA and amendments to existing standards currently delegated, as amended between September 1, 2016 and June 30, 2018, as adopted by the State.

More recently, by letter dated March 23, 2021, the EPA received a request from ODEQ to update its existing NESHAP delegation. With certain exceptions noted in section VI of this document, ODEQ's request includes certain NESHAP in 40 CFR parts 61 and 63. ODEQ's request included newly incorporated NESHAPs promulgated by the EPA and amendments to existing standards currently delegated, as amended between June 30, 2018 and June 30, 2019, as adopted by the State.

## **VI. What is Not Being Delegated?**

All authorities not affirmatively and expressly proposed for delegation by this action will not be delegated. These include the following parts 61 and 63 authorities listed below:

- 40 CFR part 61, subpart B (National Emission Standards for Radon Emissions from Underground Uranium Mines);
- 40 CFR part 61, subpart H (National Emission Standards for Emissions of Radionuclides Other Than Radon From Department of Energy Facilities);

- 40 CFR part 61, subpart I (National Emission Standards for Radionuclide Emissions from Federal Facilities Other Than Nuclear Regulatory Commission Licensees and Not Covered by Subpart H);

- 40 CFR part 61, subpart K (National Emission Standards for Radionuclide Emissions from Elemental Phosphorus Plants);

- 40 CFR part 61, subpart Q (National Emission Standards for Radon Emissions from Department of Energy facilities);

- 40 CFR part 61, subpart R (National Emission Standards for Radon Emissions from Phosphogypsum Stacks);

- 40 CFR part 61, subpart T (National Emission Standards for Radon Emissions from the Disposal of Uranium Mill Tailings); and

- 40 CFR part 61, subpart W (National Emission Standards for Radon Emissions from Operating Mill Tailings).

In addition, the EPA regulations provide that we cannot delegate to a state any of the Category II Subpart A authorities set forth in 40 CFR 63.91(g)(2). These include the following provisions: § 63.6(g), Approval of Alternative Non-Opacity Standards; § 63.6(h)(9), Approval of Alternative Opacity Standards; § 63.7(e)(2)(ii) and (f), Approval of Major Alternatives to Test Methods; § 63.8(f), Approval of Major Alternatives to Monitoring; and § 63.10(f), Approval of Major Alternatives to Recordkeeping and Reporting. Also, some parts 61 and 63 standards have certain provisions that cannot be delegated to the states. Furthermore, no authorities are being proposed for delegation that require rulemaking in the **Federal Register** to implement, or where Federal oversight is the only way to ensure national consistency in the application of the standards or requirements of CAA section 112. Finally, this action does not propose delegation of any authority under section 112(r), the accidental release program.

If this action is finalized as proposed, all questions concerning implementation and enforcement of the excluded standards in the State of Oklahoma should be directed to the EPA Region 6 Office.

The EPA is proposing a determination that the NESHAP program submitted by Oklahoma meets the applicable requirements of CAA section 112(l)(5) and 40 CFR part 63, subpart E.

As more fully discussed in section XIII of this document, the proposed delegation to ODEQ to implement and enforce certain NESHAP extends to sources or activities located in certain areas of Indian country, as defined in 18 U.S.C. 1151.

## **VII. How Will Statutory and Regulatory Interpretations be Made?**

If this NESHAP delegation update is finalized as proposed, ODEQ will obtain concurrence from the EPA on any matter involving the interpretation of section 112 of the CAA or 40 CFR parts 61 and 63 to the extent that implementation, administration, or enforcement of these sections have not been covered by prior EPA determinations or guidance.

## **VIII. What Authority Does the EPA Have?**

We retain the right, as provided by CAA section 112(l)(7) and 40 CFR 63.90(d)(2), to enforce any applicable emission standard or requirement under section 112. In addition, the EPA may enforce any federally approved State rule, requirement, or program under 40 CFR 63.90(e) and 63.91(c)(1)(i). The EPA also has the authority to make certain decisions under the General Provisions (subpart A) of parts 61 and 63. We are proposing to delegate to the ODEQ some of these authorities, and retaining others, as explained in sections V and VI above. In addition, the EPA may review and disapprove State determinations and subsequently require corrections. *See* 40 CFR 63.91(g)(1)(ii). The EPA also has the authority to review ODEQ's implementation and enforcement of approved rules or programs and to withdraw approval if we find inadequate implementation or enforcement. *See* 40 CFR 63.96.

Furthermore, we retain the authority in an individual emission standard that may not be delegated according to provisions of the standard. Finally, we retain the authorities stated in the original delegation agreement. *See* “Provisions for the Implementation and Enforcement of NSPS and NESHAP in Oklahoma,” effective March 25, 1982, a copy of which is included in the docket for this action. A table of currently delegated NESHAP standards and how the updated NESHAP delegation would look if this proposal is finalized may be found in the Technical Support Document (TSD) included in the docket for this action. The table also shows the authorities that cannot be delegated to any state or local agency.

## **IX. What Information Must ODEQ Provide to the EPA?**

ODEQ must provide any additional compliance related information to the EPA, Region 6, Office of Enforcement and Compliance Assurance, within 45 days of a request under 40 CFR 63.96(a). In receiving delegation for specific General Provisions authorities, ODEQ must submit to EPA Region 6 on a semi-annual basis, copies of determinations issued under these authorities. *See* 40 CFR 63.91(g)(1)(ii). For part 63 standards, these determinations include: § 63.1, Applicability Determinations; § 63.6(e), Operation and Maintenance Requirements—Responsibility for Determining Compliance; § 63.6(f), Compliance with Non-Opacity Standards—Responsibility for Determining Compliance; § 63.6(h), Compliance with Opacity and Visible Emissions Standards—Responsibility for Determining Compliance; § 63.7(c)(2)(i) and (d), Approval of Site-Specific Test Plans; § 63.7(e)(2)(i), Approval of Minor Alternatives to Test Methods; § 63.7(e)(2)(ii) and (f), Approval of Intermediate Alternatives to Test Methods; § 63.7(e)(iii), Approval of Shorter Sampling Times and Volumes When Necessitated by Process Variables or Other Factors; § 63.7(e)(2)(iv), (h)(2) and (3), Waiver of Performance Testing; § 63.8(c)(1) and (e)(1), Approval of Site-Specific Performance Evaluation (Monitoring) Test Plans; § 63.8(f), Approval of Minor Alternatives to Monitoring; § 63.8(f), Approval of Intermediate Alternatives to Monitoring; §§ 63.9 and 63.10, Approval of Adjustments to Time

Periods for Submitting Reports; § 63.10(f), Approval of Minor Alternatives to Recordkeeping and Reporting; and § 63.7(a)(4), Extension of Performance Test Deadline.

## **X. What is the EPA's Oversight Role?**

The EPA must oversee ODEQ's decisions to ensure the delegated authorities are being adequately implemented and enforced. We will integrate oversight of the delegated authorities into the existing mechanisms and resources for oversight currently in place. If, during oversight, we determine that ODEQ has made decisions that decrease the stringency of the delegated standards, then ODEQ shall be required to take corrective actions and the source(s) affected by the decisions will be notified, as required by 40 CFR 63.91(b) and (g)(1)(ii). We will initiate withdrawal of the program or rule if the corrective actions taken are insufficient. *See* 51 FR 20648 (June 6, 1986).

## **XI. Should Sources Submit Notices to the EPA or ODEQ?**

For the delegated NESHAP standards and authorities covered by this proposed action, if finalized, sources would submit all of the information required pursuant to the general provisions and the relevant subpart(s) of the delegated NESHAP (40 CFR parts 61 and 63) directly via electronic submittal to online EPA database portals that are specified in each rule, and also as paper submittals to the ODEQ at the following address: Oklahoma Department of Environmental Quality, 707 North Robinson, P.O. Box 1677, Oklahoma City, Oklahoma 73101-1677. The ODEQ is the primary point of contact with respect to delegated NESHAP. The EPA Region 6 proposes to waive the requirement that courtesy notifications and reports for delegated standards be submitted to the EPA in addition to ODEQ in accordance with 40 CFR 63.9(a)(4)(ii) and 63.10(a)(4)(ii).<sup>2</sup> For those standards and authorities not delegated as discussed above, sources must continue to submit all appropriate information to the EPA.

---

<sup>2</sup> This waiver only extends to the submission of *copies* of notifications and reports; the EPA does not waive the requirements in delegated standards that require notifications and reports be submitted to an electronic database (e.g., 40 CFR part 63, subpart HHHHHHHH).

## **XII. How Will Unchanged Authorities be Delegated to ODEQ in the Future?**

As stated in previous NESHAP delegation actions, the EPA has approved Oklahoma's mechanism of incorporation by reference of NESHAP standards into ODEQ regulations, as they apply to both part 70 and non-part 70 sources. See, e.g., 61 FR 4224 (February 5, 1996) and 66 FR 1584 (January 9, 2001). Consistent with the EPA regulations and guidance<sup>3</sup>, ODEQ may request future updates to Oklahoma's NESHAP delegation by submitting a letter to the EPA that appropriately identifies the specific NESHAP which have been incorporated by reference into State rules, reaffirms that it still meets up-front approval delegation criteria for part 70 sources, and demonstrates that ODEQ maintains adequate authorities and resources to implement and enforce the delegated NESHAP requirements for all sources. We will respond in writing to the request stating that the request for delegation is either approved or denied. A **Federal Register** action will be published to inform the public and affected sources of the updated delegation, indicate where source notifications and reports should be sent, and amend the relevant portions of the Code of Federal Regulations identifying which NESHAP standards have been delegated to the ODEQ.

## **XIII. Impact on Areas of Indian Country**

Following the U.S. Supreme Court decision in *McGirt v Oklahoma*, 140 S. Ct. 2452 (2020), the Governor of the State of Oklahoma requested approval under Section 10211(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005: A Legacy for Users, Pub. L. 109-59, 119 Stat. 1144, 1937 (August 10, 2005) ("SAFETEA"), to administer in certain areas of Indian country (as defined at 18 U.S.C. 1151) the State's environmental regulatory

---

<sup>3</sup> See Hazardous Air Pollutants: Amendments to the Approval of State Programs and Delegation of Federal Authorities, Final Rule (65 FR 55810, September 14, 2000); and "Straight Delegation Issues Concerning Sections 111 and 112 Requirements and Title V," by John S. Seitz, Director of Air Quality Planning and Standards, EPA, dated December 10, 1993.

programs that were previously approved by the EPA outside of Indian country.<sup>4</sup> The State's request excluded certain areas of Indian country further described below.

On October 1, 2020, the EPA approved Oklahoma's SAFETEA request to administer all of the State's EPA-approved environmental regulatory programs, including the delegated portions of the NESHAP program, in the requested areas of Indian country.<sup>5</sup> As requested by Oklahoma, the EPA's approval under SAFETEA does not include Indian country lands, including rights-of-way running through the same, that: (1) qualify as Indian allotments, the Indian titles to which have not been extinguished, under 18 U.S.C. 1151(c); (2) are held in trust by the United States on behalf of an individual Indian or Tribe; or (3) are owned in fee by a Tribe, if the Tribe (a) acquired that fee title to such land, or an area that included such land, in accordance with a treaty with the United States to which such Tribe was a party, and (b) never allotted the land to a member or citizen of the Tribe (collectively "excluded Indian country lands").

EPA's approval under SAFETEA expressly provided that to the extent EPA's prior approvals of Oklahoma's environmental programs excluded Indian country, any such exclusions are superseded for the geographic areas of Indian country covered by the EPA's approval of Oklahoma's SAFETEA request.<sup>6</sup> The approval also provided that future revisions or amendments to Oklahoma's approved environmental regulatory programs would extend to the covered areas of Indian country (without any further need for additional requests under SAFETEA).

As explained above, the EPA is proposing to approve an update to the Oklahoma NESHAP delegation. Consistent with the EPA's October 1, 2020 SAFETEA approval, if this action is finalized as proposed, Oklahoma's delegation of the NESHAP program will apply to all

---

<sup>4</sup> A copy of the Governor's July 22, 2020 request can be found in the docket for this proposed rulemaking.

<sup>5</sup> A copy of EPA's October 1, 2020 approval can be found in the docket for this proposed rulemaking.

<sup>6</sup> EPA's prior approvals relating to Oklahoma's NESHAP delegation frequently noted that the NESHAP delegation was not approved to apply in areas of Indian country located in the State. *See, e.g.*, 83 FR 53183 (October 22, 2018). Such prior expressed limitations are superseded by the EPA's approval of Oklahoma's SAFETEA request.

areas of Indian country within the State of Oklahoma, other than the excluded Indian country lands.<sup>7</sup>

#### **XIV. Proposed Action**

In this action, the EPA is proposing to approve an update to the Oklahoma NESHAP delegation that would provide the ODEQ with the authority to implement and enforce certain newly incorporated NESHAP promulgated by the EPA and amendments to existing standards currently delegated, as they existed through June 30, 2019. This proposed delegation to ODEQ extends to sources and activities located in certain areas of Indian country, as explained in section XIII above.

#### **XV. Statutory and Executive Order Reviews**

Under the CAA, the Administrator has the authority to approve section 112(l) submissions that comply with the provisions of the Act and applicable Federal regulations. In reviewing section 112(l) submissions, the EPA's role is to approve state choices, provided that they meet the criteria and objectives of the CAA and of the EPA's implementing regulations. Accordingly, this proposed action would merely approve the State's request as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);

---

<sup>7</sup> In accordance with Executive Order 13990, EPA is currently reviewing our October 1, 2020 SAFETEA approval and is engaging in further consultation with tribal governments and discussions with the State of Oklahoma as part of this review. EPA also notes that the October 1, 2020 approval is the subject of a pending challenge in federal court. (*Pawnee v. Regan*, No. 20-9635 (10th Cir.)). Pending completion of EPA's review, EPA is proceeding with this proposed action in accordance with the October 1, 2020 approval. EPA's final action on the NESHAP delegation update will address the scope of the State's program with respect to Indian country, and may make any appropriate adjustments, based on the status of our review at that time. If EPA's final action on Oklahoma's NESHAP delegation update is taken before our review of the SAFETEA approval is complete, EPA may make further changes to the approval of Oklahoma's NESHAP delegation to reflect the outcome of the SAFETEA review.

- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

This proposal to approve Oklahoma's request to update the NESHAP delegation will apply, if finalized as proposed, to certain areas of Indian country as discussed in section XIII above, and therefore has tribal implications as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). However, this action will neither impose substantial direct compliance costs on federally recognized tribal governments, nor preempt tribal law. This action will not impose substantial direct compliance costs on federally recognized tribal governments because no actions will be required of tribal governments. This action will also not preempt tribal law as no Oklahoma tribe implements a regulatory program under the CAA, and thus does not have

applicable or related tribal laws. Consistent with the EPA Policy on Consultation and Coordination with Indian Tribes (May 4, 2011), the EPA has offered consultation to tribal governments that may be affected by this action.

## **List of Subjects**

### *40 CFR Part 61*

Environmental protection, Administrative practice and procedure, Air pollution control, Arsenic, Benzene, Beryllium, Hazardous substances, Mercury, Intergovernmental relations, Reporting and recordkeeping requirements, Vinyl chloride.

### *40 CFR Part 63*

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous substances, Intergovernmental relations, Reporting and recordkeeping requirements.

**Authority:** 42 U.S.C. 7401 *et seq.*

Dated: August 18, 2021.

**David Garcia,**

*Director, Air and Radiation Division, Region 6.*

[FR Doc. 2021-18164 Filed: 8/27/2021 8:45 am; Publication Date: 8/30/2021]